IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 703 of 1991

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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AGRO ENGINEERING WORKS - Appellant(s)
Versus
MASHRUBEN HIRABHAI PATELIA & 3 - Defendant(s)

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Appearance :
MR RJ OZA for Appellant(s) : 1,
MR MAHESH R SHAH for Defendant(s) : 1 - 2.
MR PV NANAVATI for Defendant(s) : 3,
MR VIBHUTI NANAVATI for Defendant(s) : 3,
MR MD PANDYA for Defendant(s) : 4,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 17/08/2006

ORAL JUDGMENT

1. This appeal under Section 30 of the Workmen's Compensation Act, is directed against the judgement and award dated 25.4.1991 passed by the Civil Judge (S.D.) and Ex-officio Commissioner for Workmen's Compensation, Nadiad, in W.C.C. No. 3766 of 1988 whereby the same was allowed. Tribunal ordered the original applicant is entitled to get Rs. 61,122/- with running interest.

2. The case of the present appellant is that the deceased Ranchhodbhai Hirabhai, who was the son of the original applicants was working with the present applicant and was employed with the present applicant to help in electric poles electric line etc. The present applicant insured their workers and helpers who were engaged in the work of electric line with the insurance company. The deceased was helper as a employee with the present applicant. While he was working he got shock and fell down to earth.

3. Learned advocate for the appellant has submitted that learned Commissioner ought to have appreciated that the appellant has made provisional payment to the original appellants and, therefore, Section 4A cannot be affected for the purpose of saddling the appellant with liability of penalty and interest on the amount of compensation.

3.1 He further submitted that the learned Commissioner ought to have appreciated that the appellant was vigilant to received the claim of the compensation on behalf of the original applicants and

whatever delay has occasioned, the same has been caused on the part of the respondent insurance company, thereupon, the learned Commissioner ought to have held that the respondent insurance company is liable for the amount of penalty and also interest.

4. On perusal of the record it is found that the deceased was under the employment of the appellant. As regards the position of respondent no.2 is concerned, it is a settled law that the employer while entering into contract of insurance can act as per his will and can contract out of certain items of his liability such as liability to pay interest. In the case of **New India Assurance Co. Ltd. V. Harshadbhai Amrutbhai Modhiya, reported in 2006 AIR SCW 2352** in paras 14, 15 and 21 it is held as under:

> 14. By reason of the provisions of the Act, an employer is not statutorily liable to enter into a contract of insurance. Where, however, a contract of insurance is entered into by and between the employer and the insurer, the insurer shall be liable to indemnify the employer. The insurer, however, unlike under the provisions of the Motor Vehicles Act does not have a statutory liability. Section 17 of the Act does not provide for any restriction in the matter of contracting out by the employer vis-a-vis the insurer.

> 15. The terms of a contract of insurance would depend upon the volition of the parties. A contract of insurance is governed by the provisions of the Insurance Act. In terms of the provisions of the Insurance Act, an insured is bound to pay premium which is to be calculated in the manner provided for therein. With a view to minimize his liability, an employer can contract out so as to make the insurer not liable as regards indemnifying him in relation to certain matters which do not strictly arise out of the mandatory provisions of any statute. Contracting out, as regards payment of interest by an employer, therefore, is not prohibited in law.
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> 21. For the reasons aforementioned, the impugned judgement cannot be sustained. It is set aside accordingly. The appeal is allowed. The appellant is not liable for the interest. However, we make it clear that the employer shall be liable to pay the amount of interest to the claimant. In the facts and circumstances of the case, there shall be no order as to costs."

In view of the above decision, the insurance company can be held liable only for the amount of compensation payable to the original claimant, and no interest and the penalty can be recovered from the insurance company. The rate of interest as per statutory provision is required to be paid at the rate of 6%. The insurance company shall be liable only for 6% in view of the provisions of the Act prior to amendment from 01.06.1995. If the amount has withdrawn by the claimant it shall be

open for the appellant to recover from the insurance company.

5. In the premises aforesaid, the appeal is, partly allowed. It is held that the claimant shall be entitle to interest at the rate of 6% per annum. The award of the authority is modified accordingly. No order as to costs.

(K.S. JHAVERI, J.)

Suresh*